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No. 89-39

In the Supreme Court of the United States

OCTOBER TERM, 1989

GEORGE N. MEROS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court improperly excluded evidence that petitioner offered in his defense.

2. Whether the Currency and Foreign Transactions Reporting Act, 31 U.S.C. 5311 *et seq.*, and the regulations promulgated thereunder, prohibit structuring transactions in order to cause a financial institution to fail to file Currency Transaction Reports.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 866 F.2d 1304. A supplemental opinion of the court of appeals (Pet. App. B) and an

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[1] The petition appendix lacks page numbers for the published opinion and does not distinguish among that opinion, the supplemental opinion, and the order on petition for rehearing. We have therefore assigned numbering to the published opinion and have labeled the three decisions, respectively, as Pet. Apps. A, B, and C.

order on petition for rehearing (Pet. App. C) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1989. A petition for rehearing was denied on April 11, 1989. The petition for a writ of certiorari was filed on June 9, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiracy to conduct a racketeering enterprise, in violation of 18 U.S.C. 1962(d); one substantive racketeering count, in violation of 18 U.S.C. 1962(c); one count of conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846; one count of importation of marijuana, in violation of 21 U.S.C. 952(a), 963; one count of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); one count of using a wire transfer in foreign commerce to facilitate unlawful activity, in violation of 18 U.S.C. 1952; one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; one count of traveling in foreign commerce to facilitate unlawful activity, in violation of 18 U.S.C. 1952; two counts of concealing a material fact in a government matter, in violation of 18 U.S.C. 1001; and eight counts of causing a financial institution to fail to file a Currency Transaction Report (CTR), in violation of 31 U.S.C. 1081 (1976), 1059. He was sentenced to a total of 40 years' imprisonment and a two-year special parole term, and was ordered to pay a $25,000 fine.

1. a. The evidence at trial showed that between 1976 and 1984 petitioner and his co-defendants engaged in a conspiracy to smuggle large quantities of marijuana into the United States. Petitioner, an attorney, was the "kingpin" of the operation. He supplied financial backing for the venture, engaged in money laundering, established Swiss bank accounts for the profits of the enterprise, and assisted individual confederates with their attorney's fees. As part of his responsibilities, petitioner helped to structure cash transactions so as to cause various banks to fail to file required CTRs. Pet. App. A, at 3-4.[2]

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[2] Under federal law, a financial institution is required to file a CTR whenever a customer makes a currency payment in excess of $10,000. 31 U.S.C. 5313 (formerly 31 U.S.C. 1081, 1082, 1083 (1976)); 31 C.F.R. 103.22(a) (1982).

Section 5313(a) (31 U.S.C.) provides in relevant part:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency * * * in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes.

Section 103.22(a) (31 C.F.R.) (1982) provides:

> Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000. Such reports shall be made on forms prescribed by the Secretary and all information called for in the forms shall be furnished.

Each Currency Transaction Report form contained the following provision (Treasury Form 4789 (1980)):

Petitioner first became involved in marijuana smuggling in the fall of 1976, when he taught David Strongosky, a drug smuggler, how to launder the proceeds from his smuggling operation. Thereafter, in late 1978, petitioner conspired with Byron Wever to import 60,000 pounds of marijuana into the United States from Colombia. Petitioner supplied Wever with $200,000 in cash to purchase the vessel *Mis Vicki* for the venture, and gave him $140,000 in cash to help pay for the marijuana. Pet. App. B, at 2-4.

On January 23, 1979, the *Mis Vicki*, loaded with 52,000 pounds of marijuana, was seized by agents of the Georgia Bureau of Investigation (GBI). The GBI agents also arrested the crew and offloaders. Petitioner advised Wever and his wife, Carol Wever, to flee to Jacksonville, Florida, in order to avoid arrest. When the Wevers were arrested, they had in their possession a $20,000 personal check that petitioner had given them to cover their smuggling expenses; petitioner later tried to explain that check by fabricating a contract of sale for the Wevers' condominium. In addition, petitioner posted a $300,000 bond for the Wevers and negotiated bonds for the crewmen. Pet. App. B, at 5-6.

The evidence at trial included a variety of financial records obtained from petitioner's office pursuant to a search warrant. Among those records were documents reflecting numbered Swiss bank accounts, international travel documents, records of money laundering, and petitioner's handwritten 17-point plan

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* * * Multiple transactions by or for any person which in any one day total more than $10,000 should be treated as a single transaction, if the financial institution is aware of them.

for international money laundering. Gov't C.A. Br. 44.

b. Petitioner contended at trial that Carol Wever's brother, Vinnie Carone, was the financial backer of the drug transactions, and that the government's witnesses were framing petitioner in order to protect Carone. See Pet. App. B, at 34-35. Petitioner attempted to elicit, without success, favorable testimony on that point during his cross-examination of several witnesses. One of those witnesses, Byron Wever, denied that he had told GBI Agent Harry Coursey that Carone was Wever's partner; that he was using Carone's boat in a narcotics deal; that he was buying a boat with Carone and another man; or that Carone was "on the run." See Pet. 12-14.

Petitioner thereafter called Agent Coursey as a defense witness. On direct examination, Coursey testified that while acting in an undercover capacity, he had dealt with Byron and Carol Wever in connection with several smuggling ventures between February 1978 and January 1979. Petitioner then sought leave to ask Coursey about statements purportedly made to him by Byron Wever. Petitioner represented that Coursey would testify, among other things, that Wever had told him that Vinnie Carone was his partner in the *Mis Vicki* venture. 6/26/85 Tr. 100-11. Petitioner offered Wever's statements to Coursey as proof of the matter asserted—to establish, as petitioner's counsel put it, that "the true partner of Byron Wever was in fact Vinnie Carone." 6/25/85 Tr. 14-1-1. See also *id.* at 14-1-8 (offering the Wever statements to "establish who the true partner was"); 6/26/85 Tr. 14-10, 14-11 (purpose of the offer of proof was to show that Wever and Carone were in a conspiracy that did not include petitioner); *id.* at 14-43 to 14-44, 82.

Petitioner predicated the offer of Wever's statements on several legal grounds, principally the co-conspirator exception to the hearsay rule (see Fed. R. Evid. 801(d)(2)(E)). His trial counsel explained that "the statements * * * Wever made during the MIS VICKI conspiracy to an agent of the United States in an undercover capacity, who was a party to the conspiracy" were admissible as co-conspirator statements. 6/25/85 Tr. 14-1-4. See also *id.* at 14-1-9; 6/26/85 Tr. 14-8, 14-16 to 14-30. Alternatively, petitioner's counsel contended that the statements could be admitted—again for the truth of the matter asserted—as declarations against Wever's penal interest, pursuant to Fed. R. Evid. 804(b)(3) (6/26/85 Tr. 14-14), a contention which the trial court noted was a "shift in position" (*ibid.*). Finally, petitioner contended, in passing, that the testimony could be admitted as prior inconsistent statements of the declarant Wever; but even in that context, petitioner's counsel sought to use the statements as evidence of the truth of the matters asserted. See 6/25/85 Tr. 14-1-9; 6/26/85 Tr. 14-43 to 14-44, 100-14.

The trial court agreed that Wever's statements might be admissible for impeachment purposes. See 6/25/85 Tr. 14-1-17; 6/26/85 Tr. 14-44. The court refused, however, to admit the statements under the co-conspirator exception. The court explained that while petitioner was entitled to establish his proffered defense, he could not do so "under the co-conspirator exception to the hearsay rule" (6/25/85 Tr. 14-1-17). The court also held that the Wever statements could not be admitted as declarations against penal interest. The court found that Wever, the declarant, was not "unavailable" for purposes of Rule 804(b)(3). 6/26/85 Tr. 14-34 to 14-37.

2. The court of appeals affirmed in part and reversed in part. Relying on its prior decisions in *United States* v. *Cure*, 804 F.2d 625 (11th Cir. 1986); *United States* v. *Giancola*, 783 F.2d 1549 (11th Cir.), cert. denied, 479 U.S. 1018 (1986); and *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983), the court held in a published opinion (Pet. App. A) that petitioner was criminally liable for causing a bank to fail to file CTRs when he conducted multiple transactions aggregating to more than $10,000 in a single day at different branches of the same bank, even though each individual transaction was less than $10,000. In an unpublished supplementary opinion (Pet. App. B), the court also rejected petitioner's claim that the district court had erred in excluding testimony by Agent Coursey concerning the agent's conversations with Byron Wever. Pet. App. B, at 34-38. The court held that the testimony could not be admitted under Fed. R. Evid. 801(d)(2)(E) because it was not offered *against* a member of the conspiracy, but rather was offered *by* a conspirator and against the government. The court also held that the district court did not abuse its discretion in declining to admit the evidence under the so-called "catch-all" provision, Fed. R. Evid. 803(24) (Pet. App. B, at 37-38), and it held that the evidence was not admissible either as a declaration against interest, Fed. R. Evid. 804(b)(3), or as a prior inconsistent statement, Fed. R. Evid. 613 (Pet. App. C, at 3).

ARGUMENT

1. Petitioner contends (Pet. 8-24) that the district court improperly limited his ability to present his defense that Carone was actually the financial backer of the smuggling ventures charged in the indictment. The lower courts' factbound resolution of that claim does not warrant further review.

Petitioner was not foreclosed from attempting to portray Carone as the financier of the smuggling venture. Indeed, the court permitted petitioner to explore Carone's drug smuggling background at length, particularly during his cross-examination of Carone's sister, Carol Wever, and her husband Byron Wever. Unfortunately for petitioner, that testimony was largely unfavorable to his theory; both witnesses denied that Carone had participated in the ventures charged in the indictment. See Gov't C.A. Br. 179; Pet. 12-14.

Petitioner contends that the trial court should have permitted him to support his theory by eliciting Wever's statements to Agent Coursey. The trial court correctly refused that offer of proof. Petitioner sought Wever's testimony in order to prove the truth of the matters asserted—to show that Carone was the actual financier of the enterprise. Offered for that purpose, the proffered testimony was hearsay and therefore inadmissible, as the court of appeals held. Because Coursey's testimony was offered on behalf of, rather than against, a party to the conspiracy, it did not meet the requirements of the co-conspirator exception to the hearsay rule set forth in Fed. R. Evid. 801(d)(2)(E). Nor could the testimony have been admitted as a declaration against interest, since, as the court of appeals explained (Pet. App. C, at 2-3), the declarant, Byron Wever, was

available as a witness and did not exhibit a lack of memory on any of the points identified by petitioner. See Fed. R. Evid. 804(a).[3]

Petitioner claims, however, that the Wever statements to Coursey should have been admitted "to counter and impeach Wever's testimony" (Pet. 14). In that connection, he notes that his trial counsel had represented that Coursey would have testified, if asked, that "Vinnie Carone was the money man and his partner in the 'Mis Vicki'" (*id.* at 15). It is clear from the context, however, that petitioner offered those statements for their truth, and not as impeachment. Indeed, when the court refused the proffer—holding that the statements did not meet the "predicate requirement for the co-conspirator's [exception]"—petitioner's counsel insisted that Wever's statements were "[t]he only available evidence to prove those facts * * *." 6/26/85 Tr. 100-13. Petitioner did not suggest, as he does now, that the statements should have been admitted for impeachment purposes.

2. Petitioner contends (Pet. 24-26) that this Court should review the government's theory that it is illegal to structure currency transactions so as to avoid the currency reporting requirements. The same claim has been before the Court in several recent cases, and in each case the Court denied certiorari. See *Lafaurie* v. *United States*, 108 S. Ct. 2015 (1988); *Perlmutter* v. *United States*, 108 S. Ct. 1110

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[3] Petitioner states (Pet. 19-20) that the court of appeals erred in its original opinion when it referred to Michael Ferrentino as the declarant whose availability was at issue. In denying petitioner's rehearing petition (Pet. App. C, at 1-2), however, the court corrected its opinion to refer instead to Byron Wever.

(1988); *Florez* v. *United States*, 108 S. Ct. 1014 (1988); *Giancola* v. *United States*, 479 U.S. 1018 (1986); *Heyman* v. *United States*, 479 U.S. 989 (1986). In our briefs in opposition in those cases, we noted that there has been some division among the circuits on this and related issues arising from prosecutions under Section 5313.[4] Congress, however, has recently enacted the Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18, which is included as Subtitle H of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1351, 100 Stat. 3207. The Money Laundering Control Act was expressly designed to overrule the cases that conflict with the result reached by the court of appeals here. The new law deprives the statutory issue presented in the petition of any continuing significance. Accordingly, petitioner's claim does not warrant further review by this Court.

a. Under Section 5313 and its accompanying regulations, only financial institutions have a duty to file CTRs in connection with cash transactions. Several courts of appeals have nevertheless recognized that under 18 U.S.C. 2(b) a defendant may still be held criminally liable for causing a financial institution to violate its statutory duties. *United States* v. *Lafaurie*, 833 F.2d 1468, 1470-1471 (11th Cir. 1987), cert. denied, 108 S. Ct. 2015 (1988); *United States* v. *Richeson*, 825 F.2d 17 (4th Cir. 1987); *United States* v. *Heyman*, 794 F.2d 788 (2d Cir.), cert. denied, 479 U.S. 989 (1986); *United States* v. *Cook*, 745 F.2d 1311 (10th Cir. 1984), cert. denied,

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[4] We have furnished counsel with a copy of our brief in opposition in the *Lafaurie* case, in which we restated the arguments that we had previously made in the *Perlmutter*, *Florez*, *Giancola*, and *Heyman* cases.

469 U.S. 1220 (1985); *United States* v. *Puerto*, 730 F.2d 627 (11th Cir.), cert. denied, 469 U.S. 847 (1984); *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983). See also *United States* v. *Thompson*, 603 F.2d 1200 (5th Cir. 1979). Other courts have taken a contrary view, holding that because 31 U.S.C. 5313 and the applicable regulations do not impose on third parties a duty to file CTRs, Section 2(b) cannot be read to impose criminal liability on third parties who, by structuring their transactions, cause a financial institution to fail to file a CTR. See, *e.g.*, *United States* v. *Gimbel*, 830 F.2d 621, 624-625 (7th Cir. 1987); *United States* v. *Larson*, 796 F.2d 244 (8th Cir. 1986); *United States* v. *Reinis*, 794 F.2d 506, 508 (9th Cir. 1986); *United States* v. *Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985).

Whatever the merit of the latter decisions in construing Section 5313, Congress has totally revised the law in this area by enacting the Money Laundering Control Act of 1986. The explicit purpose of the new Act was to overrule the decisions in *Anzalone* and *Varbel* and to codify the decision in *Tobon-Builes*—on which the court below relied in the present case. Section 1354(a) of the Act, entitled "Structuring Transactions to Evade Reporting Requirements Prohibited," creates a new section of Title 31 (Section 5324 (Supp. V 1987)), which provides as follows:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required

> under section 5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

By its terms, the statute imposes criminal liability for causing a financial institution to fail to file a CTR, as well as for structuring deposits, as petitioner did here, for the purpose of evading the reporting requirements of Section 5313. In formalizing these statutory obligations, Congress made clear that its purpose was to overrule the First and Ninth Circuit decisions in *United States* v. *Anzalone*, *supra*, and *United States* v. *Varbel*, *supra*, and the Eleventh Circuit decision in *United States* v. *Denemark*, 779 F.2d 1559 (1986). The Senate Committee on the Judiciary, reporting favorably on an identical provision in S. 2683, 99th Cong., 2d Sess. (1986), an earlier version of the money laundering bill, stated (S. Rep. No. 433, 99th Cong., 2d Sess. 21-22 (1986)):

> Under present law, money launderers are successfully prosecuted in some judicial circuits for causing financial institutions not to file reports on multiple currency transactions totaling more than $10,000 or causing financial institutions to file incorrect reports. In such cases, the actual money launderers are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and section 1001 (concealing from the Government a material fact by a trick, scheme, or device). For example, in *United States* v. *Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983), the Eleventh Circuit Court of Appeals upheld a conviction under 18 U.S.C. 1001 where the defendants had engaged in a money laundering scheme in which they had

> structured a series of currency transactions, each one less than $10,000 but totaling more than $10,000, to evade the reporting requirements. * * * In contrast, the First Circuit Court of Appeals, in *United States* v. *Anzalone*, 766 F.2d 676 (1st Cir. 1985), the Eleventh Circuit Court of Appeals in *United States* v. *Denemark*, 779 F.2d 1559 (11th Cir. 1986), and the Ninth Circuit Court of Appeals in *United States* v. *Varbel*, 780 F.2d 758 (9th Cir. 1986) have held that structuring currency transactions to avoid the reporting requirements did not violate 18 U.S.C. section 1001.
>
> Subsection (h) would codify *Tobon-Builes* and like cases and would negate the effect of *Anzalone*, *Varbel* and *Denemark*. It would expressly subject to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, the proposed amendment would create the offense of structuring a transaction to evade the reporting requirements, without regard to whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

The House intended precisely the same results when it formulated a virtually identical version of the money laundering provisions. The Committee on Banking, Finance and Urban Affairs stated (H.R. Rep. No. 746, 99th Cong., 2d Sess. 18-19 (1986)):

> In some judicial circuits, money launderers have been successfully prosecuted for causing financial institutions not to file reports on such multiple currency transactions. In such cases, defendants are charged with violations of 18 U.S.C. 2 (aiding and abetting or causing another to commit an offense) and Section 1001

(concealing from the government a material fact by a trick, scheme, or device).[5]

In contrast, other cases have held that the Act and its regulations impose no duty on the customer to inform the financial institution of the structured nature of the transactions, that the reporting duties are placed solely upon the financial institution, and therefore, only a financial institution can directly violate the reporting requirements.[6]

The Committee believes that Section 2 of H.R. 5176 would resolve the legal issues raised by the various circuit courts by expressly subjecting to potential liability a person who causes or attempts to cause a financial institution to fail to file a required report or who causes a financial institution to file a required report that contains material omissions or misstatements of fact. In addition, it would create the offense of structuring a transaction to evade the reporting requirements, without regard for whether an individual transaction is, itself, reportable under the Bank Secrecy Act.

In light of this new legislation there is no reason to expect that the previous conflict among the circuits will persist. Accordingly, review by this Court is unwarranted.

b. In any event, the court of appeals' decision is correct under the law as it existed prior to the enactment of the Money Laundering Control Act of 1986.

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[5] For this proposition, the House Report cited the Eleventh Circuit's decision in *Tobon-Builes* (H.R. Rep. No. 746, *supra*, at 18 n.1).

[6] For this proposition, the House Report cited, *inter alia*, *Anzalone* and *Varbel* (H.R. Rep. No. 746, *supra*, at 19 n.2).

The court below did not address in detail the underlying question whether a third party who causes a bank to breach its reporting obligations may be held liable under Section 5313, having resolved that issue in its earlier decision in *Tobon-Builes*. In *Tobon-Builes*, the court of appeals had held that although the duty to file CTRs is imposed only on financial institutions, a third party who causes the institution to violate its duties may be convicted under 18 U.S.C. 2(b).[7] That holding comports with the broad language of Section 2(b), which extends liability to anyone who "causes an act to be done which if directly performed by him or another would be an offense against the United States." As the reviser's note to 18 U.S.C. 2 states, the aiding and abetting statute

> removes all doubt that one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.[8]

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[7] Correspondingly, a third party who conspires to cause a bank to violate its reporting obligations may be convicted under 18 U.S.C. 371. See *United States* v. *Sans*, 731 F.2d 1521, 1530-1532 (11th Cir. 1984), cert. denied, 469 U.S. 1111 (1985); *United States* v. *Lester*, 363 F.2d 68, 73-74 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

[8] The reviser's note also indicates that Section 2 was intended to embrace this Court's decision in *United States* v. *Giles*, 300 U.S. 41, 43 (1937). There, the Court upheld the conviction of a bank teller under a statute that prohibited bank employees from "mak[ing] any false entry in any book * * * of [a] Federal reserve bank or member bank." The defendant was convicted of having caused a bookkeeper for the bank to make false deposit entries in the bank's ledger,

Those principles apply here as well. Although the use of structured deposits may prevent various banks from learning of their duty to file CTRs, a bank customer's success in that endeavor cannot shield him from liability under Section 2(b). Petitioner was lawfully convicted on that basis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1989

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by wrongfully withholding from circulation certain deposit slips prepared for particular bank customers. Although the defendant had not himself made the false entries, and although the "innocent bookkeeper was the teller's * * * unconscious agent," the Court held that "the statute [was] broad enough to include deliberate action from which a false entry by an innocent intermediary necessarily follows" (300 U.S. at 48-49). So, too, for Section 2(b): it applies even where the defendant, by his actions, causes an innocent intermediary unwittingly to violate the law. Accord *United States* v. *Ruffin*, 613 F.2d 408, 412-413 (2d Cir. 1979); *United States* v. *Catena*, 500 F.2d 1319, 1322-1323 (3d Cir.), cert. denied, 419 U.S. 1047 (1974); *United States* v. *Levine*, 457 F.2d 1186, 1188-1189 (10th Cir. 1972); *United States* v. *Lester*, *supra*.

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